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No. 02-1315

In the Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF TEXAS, MISSISSIPPI, AND UTAH AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a state law that denies a state-funded scholarship to a student who is qualified for it by virtue of high school grades, family income, and attendance at an accredited college in the State—solely because the student decides to pursue a degree in theology—violates the student's constitutional rights.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of Amici 1

Summary of the Argument 2

Argument 3

I. The Principle of Government Neutrality Toward Religion Emanates From Multiple Constitutional Sources 3

A. The Religion Clauses 4

1. The Free Exercise Clause 6

2. The Establishment Clause 11

B. The Equal Protection Clause 14

C. The Free Speech Clause 17

1. The Free Speech Clause Prohibits Governmental Discrimination Against Religious Viewpoints 17

2. The Scholarship Law's Exclusion of Devotional Theology Students Constitutes Viewpoint Discrimination Under *Rosenberger* 18

3. The "Funding" Cases Are Inapposite 19

4. Although Petitioners Are Not Required to Provide Promise Scholarships, They Could Not Offer Them to All Qualified Students Except Those Studying Devotional Theology 21

II. Washington's Scholarship Program Undermines the Constitutional Goal of a Pluralistic Society 23

III. Washington's Scholarship-Funding Restrictions Promote Religious Discrimination, Not Religious Neutrality 25

Conclusion 30

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U.S. 203 (1997) 11, 13

Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) 14

Ball v. Massanari, 254 F.3d 817 (CA9 2001) 15

Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) 4, 13, 24

Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984) 15

Bowen v. Kendrick, 487 U.S. 589 (1988) 13

Braunfeld v. Brown, 366 U.S. 599 (1961) 9

Burlington N. R.R. Co. v. Ford, 504 U.S. 648 (1992) 15

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 6-8, 16

City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam) 15

Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 5

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 11

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 23

Davey v. Locke, 299 F.3d 748 (CA9 2002) 3, 10, 19, 21, 23

Donahoe v. Richards, 38 Me. 379 (1854) 27

Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) 4, 8-10, 15, 16

Everson v. Bd. of Educ. of Ewing, 330 U.S. 1 (1947) 5

Gilfillan v. City of Philadelphia, 637 F.2d 924 (CA3 1980) 24

Gillette v. United States, 401 U.S. 437 (1971) 9

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 17

Griffin v. Illinois, 351 U.S. 12 (1956) 15

Grutter v. Bollinger, 123 S.Ct. 2325 (2003) 17-18

Harris v. McRae, 448 U.S. 297 (1980) 20

Hayden v. Grayson, 134 F.3d 449 (CA1 1998) 15

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 17

Larson v. Valente, 456 U.S. 228 (1982) 5

Leathers v. Medlock, 499 U.S. 439 (1991) 21

Lynch v. Donnelly, 465 U.S. 668 (1984) 23

Maher v. Roe, 432 U.S. 464 (1977) 20

Maldonado v. Houstoun, 157 F.3d 179 (CA3 1998) 15

McClesky v. Kemp, 481 U.S. 279 (1987) 16

McCollum v. Bd. of Educ., 333 U.S. 203 (1948) 28

McDaniel v. Paty, 435 U.S. 618 (1978) 7-11

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 14

Miller v. Johnson, 515 U.S. 900 (1995) 14

Mitchell v. Helms, 530 U.S. 793 (2000) 13, 25, 26, 29

Mueller v. Allen, 463 U.S. 388 (1983) 13

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 20-22

Niemotko v. Maryland, 340 U.S. 268 (1951) 14

Ohio Adult Parole Auth. v. Woodard,
523 U.S. 272 (1998) 15

Oyler v. Boles, 368 U.S. 448 (1962) 16

O'Hair v. Andrus, 613 F.2d 931 (CA D.C. 1979) 24

Perry v. Woodward, 199 F.3d 1126 (CA10 1999),
cert. denied, 529 U.S. 1110 (2000) 22

Police Department of Chicago v. Mosley,
408 U.S. 92 (1972) 15

Prince v. Massachusetts, 321 U.S. 158 (1944) 9

Regan v. Taxation With Representation of Wash.,
461 U.S. 540 (1983) 19, 20, 21

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 18

Reynolds v. United States, 98 U.S. 145 (1878) 9

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995) 4, 12, 17-21, 23, 30

Rust v. Sullivan, 500 U.S. 173 (1991) 19, 20, 21

Sch. Dist. of Abington Township v. Schempp,
374 U.S. 203 (1963) 5

Sherbert v. Verner, 374 U.S. 398 (1963) 14

Soc'y of Separationists, Inc. v. Herman,
939 F.2d 1207, 1216 (CA5 1991), *aff'd en banc*,
959 F.2d 1283 (CA5 1992) 10

Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 13

United States v. Lee, 455 U.S. 252 (1982) 8, 9

Walz v. Tax Comm'n of City of New York,
397 U.S. 664 (1970) 12, 13, 16

Widmar v. Vincent, 454 U.S. 263 (1981) 17, 23

Wisconsin v. Yoder, 406 U.S. 205 (1972) 14

Witters v. Wash. Dep't of Servs. for the Blind,
474 U.S. 481 (1986) 13

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 11, 12

Zobrest v. Catalina Foothills Sch. Dist.,
509 U.S. 1 (1993) 13

Zorach v. Clauson, 343 U.S. 306 (1952) 24

Statutes and Rules

Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (1889) 27

SUP. CT. R. 37.4 1

TEX. CONST. art. I, §7 29

U.S. CONST. amend. I 4

U.S. CONST. amend. XIV 4

WASH. CONST. art. I, § 11 ..... 28, 29

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BRIEF OF THE STATES OF TEXAS, MISSISSIPPI, AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

The States of Texas, Mississippi, and Utah appear as *amicus curiae* in support of Respondent, Joshua Davey. *See* SUP. CT. R. 37.4.

Amici States have a significant interest in this case because of the important religious liberties at stake, most prominently the right of their citizens under the Federal Constitution to be free from governmental discrimination based on religious belief or association. *Amici* States have a strong interest in ensuring that each State's citizens are protected from invidious discrimination based on religious beliefs and in promoting a pluralistic society where each citizen may worship as he or she chooses without being subject to improper governmental discrimination.

SUMMARY OF THE ARGUMENT

Washington's Promise Scholarship program discriminates on the basis of religion. It provides a generally applicable benefit to all students who meet academic and financial need requirements, and then specifically excludes only those who choose to major in theology from a religious perspective. That discrimination is wrong, and it is unconstitutional.

The court of appeals below and the many briefs in this Court devote considerable time to attempting to categorize this case, to arguing whether it is a free exercise case, or a speech case, or a government funding case. Ultimately, in this case, that determination does not matter.

Regardless of into which "box" this case is placed, the Washington program violates the constitutional neutrality principle. And that principle flows, not from just one line of cases or another or one particular clause or another, but from the Free Exercise Clause *and* the Establishment Clause *and* the Free Speech Clause *and* the Equal Protection Clause. All four clauses converge to yield a single principle, and that principle controls this case: in administering a generally applicable program, government must maintain neutrality toward religion. It cannot discriminate in favor of religion, or in favor of one religion over another, and—critically—it cannot discriminate against religion.

Because the program is generally applicable, Washington's exclusion is not government speech; it is discrimination. And, the presence of a Blaine Amendment in the Washington State Constitution cannot justify that disparate treatment. Given the history of invidious religious bigotry that gave birth to state Blaine Amendments, this Court should read those amendments narrowly to promote, not hinder, the principle of neutrality. Such a reading will foster religious diversity and pluralism, and will prevent religious discrimination.

ARGUMENT

I. The Principle of Government Neutrality Toward Religion Emanates From Multiple Constitutional Sources.

Washington's Promise Scholarship law takes away from Joshua Davey a generally available benefit—an academic scholarship for which he is otherwise qualified—solely on the basis of Davey's decision to major in theology taught from a religious perspective. The panel majority in the court of appeals concluded that the principle of governmental neutrality toward religion reflected in this Court's jurisprudence compels the conclusion that the scholarship law violates Davey's First Amendment rights under the Free Exercise Clause. *Davey v. Locke*, 299 F.3d 748, 755-56 (CA9 2002). The dissenting judge, by contrast, viewed the scholarship law as simply a choice on Washington's part not to fund Davey's pursuit of religious education. *Id.*, at 761 (McKeown, J., dissenting) ("I see the question as being whether the State of Washington may constitutionally decline to fund pastoral studies as part of its Promise Scholarship. . . . This is a funding case, not a free exercise case or a free speech case.").

At base, the dispute in the court of appeals's opinions reflects a disagreement over the category into which this case fits best: free speech, free exercise, or governmental funding. The *amici* States would submit that, in this case, the category does not matter. Constitutional adjudication should not be an exercise in deterministic taxonomy; what matters is not the "box" into which a particular case fits, but rather the constitutional principle that controls the outcome.

Irrespective of how the case is pigeonholed, the principle of governmental neutrality toward religion requires affirmance of the court of appeals. The neutrality principle itself emanates from several constitutional sources: the Free Exercise Clause, the Establishment Clause, the Equal Protection Clause, and the Free

Speech Clause. U.S. CONST. amends. I, XIV. And the neutrality principle controls this case.

Neutrality has long been a fixed and constant star in the Court's jurisprudence addressing religious discrimination under the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and the Free Speech Clause. These constitutional sources all converge in this case to demonstrate that Washington's scholarship program impermissibly discriminates on the basis of the recipient's religious choice. *Cf. Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 714-15 (1994) (O'Connor, J., concurring in part and in the judgment) ("We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship. . . . In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). Accordingly, the Court should affirm the Ninth Circuit's decision holding Washington's scholarship law unconstitutional.

A. The Religion Clauses

This Court has most directly recognized the principle of governmental neutrality toward religion in the First Amendment's Free Exercise and Establishment clauses. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). These clauses jointly ensure religious liberty by mandating that the government can neither "impose special disabilities on the basis of religious views or status," *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990) (discussing requirement of neutrality in the Free Exercise Clause), nor foster "bias or hostility to religion," *Rosenberger v. Rector & Visitors of the Univ. of Va.*,

515 U.S. 819, 846 (1995) (discussing requirement of neutrality in the Establishment Clause). *See also Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("[The Free Exercise and Establishment clauses] are to be read together, and in light of the single end which they are designed to serve. . . . The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.").

Through the interplay of the religion clauses, the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers" and "does not require the state to be their adversary." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947). As one First Amendment scholar has explained, although some perceive tension between the Free Exercise and Establishment Clauses, the two clauses are more appropriately viewed as "but two sides of the same coin" representing "a single value in our constitutional democracy—religious freedom." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986); *see also Larson v. Valente*, 456 U.S. 228, 245 (1982) ("Th[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. . . . Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."). Thus, a "proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion." *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973).

1. The Free Exercise Clause

"The Free Exercise Clause protects religious observers against unequal treatment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (citation omitted). Laws burdening religious practices must be neutral and of general applicability; otherwise, they must be narrowly tailored to advance "interests of the highest order," a "most rigorous" form of strict scrutiny that is satisfied "only in rare cases." *Id.*, at 546. The minimum requirement of neutrality is that the law must not be facially discriminatory. *Id.*, at 533. And a law fails the test of general applicability if it is substantially underinclusive. *Id.*

In *Lukumi*, the Court unanimously struck down on Free Exercise grounds a group of municipal ordinances that sought to prevent the sacrifice of animals by practitioners of Santeria, a religion that had been banned in Cuba, its country of origin, and was viewed with suspicion in the United States. After examining those ordinances, the Court concluded that "religious practice [was] being singled out for discriminatory treatment." *Id.*, at 538.

The Court rejected the City of Hialeah's argument that the ordinances were validly aimed at preventing animal cruelty and avoiding health hazards from improper disposal because the City had not attempted to pursue these goals with regard to conduct not motivated by religious belief. *Id.*, at 544-45. For example, the City exempted small-scale commercial butchery but could not explain how this exemption was consistent with its expressed interest in preventing animal cruelty and maintaining public health. Because the ordinances distinguished between identical conduct based solely on religious belief—prohibiting animal slaughter by religious believers but allowing it by secular operations—the Court concluded that they constituted a "religious gerrymander" and struck them down as an impermissible burden on Santaria practitioners' free exercise rights. *Id.*, at 535-38.

Similarly, the Court invalidated on Free Exercise grounds a Tennessee law prohibiting ministers from serving as delegates to state constitutional conventions. *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (plurality op.); *id.*, at 630-31 (Brennan, J., concurring). In *McDaniel*, the law at issue did not focus on any particular religion but instead discriminated against religion generally by banning ministers or priests "of any denomination whatever" from serving as delegates to state constitutional conventions. *Id.*, at 620. The Court cited with approval James Madison's position on legislative attempts to exclude clergy from public office:

> Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? . . . Does it not in fine violate impartiality by shutting the door [against] the Ministers of one Religion and leaving it open for those of every other[?]

435 U.S., at 624 (quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904)). Madison's position, the Court explained, "accurately reflects the spirit and purpose of the [Free Exercise and Establishment] Clauses." *Id.* Because Tennessee had conditioned the right to seek and hold office as a constitutional delegate upon the surrender of one's right to preach the religion of one's faith, the Court held that the law violated McDaniel's free-exercise rights. *Id.*, at 626.

The laws challenged in *Lukumi* and *McDaniel* violated the free-exercise neutrality principle because they singled out religious belief or affiliation as the basis for providing different treatment to persons who were otherwise similarly situated. In *Lukumi*, the City of Hialeah prohibited certain conduct—animal sacrifice—solely when done with religious intent, while allowing the same conduct when performed by persons unmotivated by religious belief. Similarly, the Promise Scholarship program takes away a generally

available benefit from Davey solely because of his declared intent—based on his religious faith—to study theology from a religious perspective. And like the law in *McDaniel*, which forced ministers to either abandon their religious calling or forgo their right to hold public office, the Promise Scholarship program discriminates against religion by forcing Davey to choose between majoring in religious theology and keeping the scholarship for which Washington had determined he was otherwise eligible. As the *Davey* majority correctly reasoned, *Lukumi* and *McDaniel* support the conclusion that Washington's scholarship program violates Davey's free exercise rights because it discriminates on the basis of religion. 299 F.3d, at 753-54.

Critical to the constitutional infirmity of the Washington program is the *general applicability* of the scholarship. The State of Washington has not decided it is going to subsidize one specific type of speech, *see infra* at 18-22, or promote one specific area of academic study. Rather, Washington has decided that every student who meets the academic and financial need requirements deserves a state scholarship—except those students who choose to major in theology from a religious perspective. Yet once the State has chosen to create a generally applicable benefit, it cannot discriminate against certain of its citizens solely because they choose to act on religious convictions or pursue religious study.

This principle is the obverse of the Court's holding in *Smith*, that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S., at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)

(Stevens, J., concurring in the judgment)).[1] Just as the Free Exercise Clause does not give license for religious believers to disregard neutral and generally applicable laws, neither does it permit government to exclude religious believers from otherwise generally applicable programs.[2]

Contrary to Petitioners' argument, the Promise Scholarship law does not pass muster under *Smith* as a generally neutral law that only incidentally burdens religion. Pet'r Br., at 33. Rather, as the

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[1] *Smith*'s neutrality principle was drawn, in turn, from the Court's earlier precedents rejecting Free Exercise challenges to generally applicable laws. *See, e.g., Lee*, 455 U.S., at 258-61 (rejecting Amish employer's claim of tax exemption on religious grounds); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (rejecting claim that military draft violated free exercise rights of conscripted persons opposing war on religious grounds); *Braunfeld v. Brown*, 366 U.S. 599, 606-09 (1961) (plurality op.) (upholding validity of Sunday-closing laws against Free Exercise claim of burden on those whose religions compelled resting on days other than Sunday); *Prince v. Massachusetts*, 321 U.S. 158, 170-71 (1944) (rejecting parent's claim that Free Exercise Clause required exception to prosecution for violation of child-labor laws); *Reynolds v. United States*, 98 U.S. 145, 162-67 (1878) (rejecting claim that Free Exercise Clause prohibited application of polygamy laws to persons whose religion commanded polygamy).

[2] It is no answer to say that the Washington State program discriminates not against religious *belief*, but rather religious study. The same could be said of the law at issue in *McDaniel*, which focused on conduct rather than belief, allowing fervently believing non-clergy to run and prohibiting secretly non-believing clergy from doing the same. Government discrimination against the manifestations of religious belief (so long as they are not otherwise contrary to governing law) has the same invidious effect as discrimination against the underlying belief; government can no more discriminate indirectly against those who choose to go to church—or to study theology—than it can directly against those whose religious beliefs lead them to do the same.

court of appeals correctly observed, both the scholarship law and HECB's policy implementing it "refer on their face to religion," and the program is administered "so as to disqualify only students who pursue a degree in theology from receiving its benefit." *Davey*, 299 F.3d, at 753. A law that singles out students on the basis of their choice to engage in devotional-based religious study facially discriminates against religion and is not entitled to rational-basis deference under *Smith*.[3]

Nor can the law be justified on Petitioners' theory that it merely makes Davey's adherence to his faith more expensive, as Petitioners claim. Pet'r Br. at 33-36. If the Free Exercise Clause proscribed only direct restrictions on religious practice, then the outcome in *McDaniel* presumably would have been different. After all, the law struck down in *McDaniel* did not directly restrict or burden McDaniel's religious practice; instead, it discriminated against McDaniel by requiring him to abandon either his chosen religious calling or his elected office. Similarly, the Promise Scholarship law discriminates against Davey by forcing him either to abandon his chosen area of study—devotional theology—or to

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[3] Moreover, even if the scholarship law were deemed facially neutral, it would remain subject to strict scrutiny under *Smith* because Davey's constitutional claims involve "hybrid" constitutional rights. *See Smith*, 494 U.S., at 881-82 (describing situations involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."); *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1216 (CA5 1991) (applying hybrid-rights rule to hold that judge violated atheistic juror's free-speech and free-exercise rights by jailing her for contempt upon juror's refusal to give oath or affirmation), *aff'd en banc*, 959 F.2d 1283 (CA5 1992). Davey asserts—and the facts support—that Washington's scholarship program violates not only his free exercise rights but his rights under the Equal Protection Clause, the Establishment Clause, and the Free Speech Clause as well.

forgo the merit-based scholarship awarded him by Petitioners. Because the Free Exercise Clause prohibits discrimination against religious belief regardless of whether such discrimination constitutes a direct or indirect burden on religious practice, the scholarship law is constitutionally invalid.[4]

2. The Establishment Clause

Neutrality is also a bedrock principle in the Establishment Clause, which prevents states "from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (citing *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)). "There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (holding that exempting religious organization's secular nonprofit activities from Title VII's prohibition against religious

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[4] Nor can *McDaniel* validly be distinguished, as Petitioners assert, on the theory that Davey "is free to pursue his theology degree at another school using his own funds." Pet'r Br., at 39. Petitioners' theory rests on the unrealistic notion that Davey can "simultaneously us[e] his own money to pursue a theology degree in a separate program at a second school." *Id.*, at 25. Moreover, the alternative course of study suggested by Petitioners does not eliminate the discrimination worked by the Promise Scholarship program; that Davey alone is forced to choose between his chosen course of study and a scholarship to which he is otherwise entitled itself constitutes the very discrimination against religion that the Constitution forbids. Under Petitioners' theory, the law in *McDaniel* would have been saved from unconstitutionality by virtue of the fact that McDaniel—who as a minister was barred from serving as a state constitutional delegate—was presumably free to pursue other elected positions. The Court has never embraced such a theory.

discrimination in employment did not violate Establishment Clause) (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)). Moreover, neutrality toward religion is a "significant factor" in upholding government programs against Establishment Clause challenges. *Rosenberger*, 515 U.S., at 839.

So long as a government program is neutral—between and among different religions, and between religion and nonreligion—the fact that, through the exercise of individual choice on the part of the recipient, government money ultimately goes to religious ends does not render the government program invalid.[5]

The Court's Establishment Clause jurisprudence reflects a requirement of neutrality toward religion that exists in harmony with the neutrality commanded by the Free Exercise Clause. And a long line of this Court's cases make clear that neutrality both satisfies and is required by the Establishment Clause. *See Zelman*, 536 U.S., at 653-54 (holding that state's school-voucher program did not violate Establishment Clause because it was "neutral in all respects toward religion," accomplished a secular purpose of providing educational assistance to a broad class of persons without regard to religion, and contained no financial incentives favoring

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[5] For example, suppose a western state were to have a problem with bobcats and decided to establish a bounty of fifty dollars per bobcat to induce citizens to reduce the population. If a preacher were to go out and shoot ten bobcats and then demand his $500—even if he were to admit that every penny was to be used to purchase and distribute Bibles—there would be no Establishment Clause problem with giving him the money. The program itself would be facially neutral, and the religious ends achieved would be not because of the favoritism of government but because of the individual choice of the recipient. The same, of course, is true with respect to Joshua Davey's choice about how to spend his scholarship money, and the State should not discriminate against his individual religious choice.

religious schools over non-religious ones); *Mitchell v. Helms*, 530 U.S. 793, 808-11 (2000) (plurality op.) (upholding State's loan of non-religious educational materials to religious schools because aid had valid secular purpose and was offered on religion-neutral basis to all schools); *Agostini*, 521 U.S., at 234-35 (holding that provision of remedial instruction by government employees at sectarian schools did not violate Establishment Clause when provided to disadvantaged children on neutral basis pursuant to program containing safeguards preventing state-sponsored religious indoctrination); *Kiryas Joel Village Sch. Dist.*, 512 U.S., at 704 (plurality op.) (discussing "general principle that civil power must be exercised in a manner neutral to religion"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10-11 (1993) (rejecting claim that school district's provision of sign-language interpreter to deaf student attending sectarian school pursuant to federal law violated Establishment Clause, because aid was part of general program providing benefits neutrally to any disabled child without regard to sectarian or non-sectarian character of child's school); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989) (plurality op.) (striking down sales tax exemption available exclusively to religious publications); *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988) (upholding statute enlisting a "wide spectrum of organizations," including religious organizations, in addressing adolescent sexuality because the law was "neutral with respect to the grantee's status as a sectarian or purely secular institution"); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (*Witters II*) (upholding State's provision of tuition payments for vocational training to blind person pursuing pastoral training at Christian college); *Mueller v. Allen*, 463 U.S. 388, 398 (1983) (upholding state law allowing tax deduction for educational expenses, despite fact that vast majority of deductions went to parents of children attending sectarian schools, because deduction was available to all parents on religion-neutral basis); *Walz*, 397 U.S., at 673 (sustaining tax exemption for religious properties when

State had "not singled out one particular church or religious group or even churches as such" but instead had exempted "a broad class of property owned by nonprofit, quasi-public corporations").[6]

B. The Equal Protection Clause

The neutrality required under the Free Exercise and Establishment Clauses is closely related to the neutrality principles undergirding the Equal Protection Clause. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, *religious*, sexual, or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (emphasis added) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting), and *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983)).

This Court has long recognized that equal protection principles apply at the convergence of free-speech and free-exercise rights. *See Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) ("The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body."); *id.*, at 284 (Frankfurter, J.,

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[6] The neutrality principle is not at odds with the recognition of a facilitation of religion that lies "between the accommodations compelled by the Free Exercise Clause and the benefits to religion prohibited by the Establishment Clause." Michael W. McConnell, Accommodation of Religion, 1985 SUP. CT. REV. 1, 3. *See, e.g. Sherbert v. Verner*, 374 U.S. 398 (1963) (holding denial of unemployment benefits to person whose religious beliefs forbade working on Saturdays violated Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that compulsory education law violated Amish parents' free exercise rights).

concurring in the result) ("To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."). For example, in *Police Department of Chicago v. Mosley*, the Court struck down a statute exempting peaceful labor picketing from a general prohibition on picketing next to a school, concluding that the need for content neutrality in a state's "time, place, and manner" regulations of speech involved an equal protection claim closely intertwined with First Amendment interests: "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny its use to those wishing to express less favored or more controversial views . . . . There is an 'equality of status in the field of ideas.'" 408 U.S. 92, 95-96 (1972); *see also Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 505 (1984) (noting that principle of viewpoint-neutrality "underlies the First Amendment itself").

The anti-discrimination principle enshrined in the Religion Clauses is consonant with the Court's recognition that classifications based on religion are subject to strict scrutiny because the Equal Protection Clause forbids discrimination on the basis of a person's religious belief. *See Smith*, 494 U.S., at 886 n.3.; *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *see also Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring and dissenting) ("[N]o one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency."); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (plurality op.) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."); *accord Ball v. Massanari*, 254 F.3d 817, 823 (CA9 2001); *Maldonado v. Houstoun*, 157 F.3d 179, 184 (CA3

1998); *Hayden v. Grayson*, 134 F.3d 449, 453 n.3 (CA1 1998). And in a related vein, the Court has long declared that the decision whether to prosecute a person who has broken the law may not be based on religion. *See McClesky v. Kemp*, 481 U.S. 279 (1987) (citing *Oyler v. Boles*, 368 U.S. 448 (1962)).

It is therefore unsurprising that the Court has looked repeatedly to its equal protection jurisprudence in assessing neutrality for purposes of both Free Exercise and Establishment Clause analysis. *See Lukumi*, 508 U.S., at 540 (applying equal protection principles to Free Exercise analysis) (citing *Walz*, 397 U.S., at 696 (opining that the Establishment Clause "*requires an equal protection mode of analysis.* The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.") (Harlan, J., concurring) (emphasis added)); *see also Lukumi*, 508 U.S., at 578 (Blackmun, J., concurring) (describing the *Smith* Court as "treat[ing] the Free Exercise Clause as no more than an antidiscrimination principle").[7]

Accordingly, the Equal Protection Clause serves as yet another source of the neutrality principle that forbids governmental discrimination against religious belief.

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[7] First Amendment scholars have applauded the equal-protection aspect of the Court's treatment of the Religion Clauses. *See, e.g.*, Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L., ETHICS & PUB. POL'Y 341, 365-72 (1999); Paulsen, *supra*, at 325 ("[T]he establishment clause is best understood as providing for the equal protection of the free exercise of religion."). That equal protection component can be recognized for its independent force or characterized as an aspect of incorporation, focusing like a lens the contours of the Religion Clauses. *See Recent Development: Animal Sacrifice and Equal Protection Free Exercise*, 17 HARV. J. L. & PUB. POL'Y 262 (1994); *cf.* Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1136-37 & n.23 (1991).

C. The Free Speech Clause

1. The Free Speech Clause Prohibits Governmental Discrimination Against Religious Viewpoints.

The neutrality principle expressed in the Religion Clauses is also echoed in the Free Speech Clause's prohibition on viewpoint discrimination. This Court has repeatedly held that the Free Speech Clause forbids the exclusion of speakers or groups from a public forum or limited public forum because of their religious message. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that public school's exclusion of Christian Bible club from after-school community-use program based on club's religious nature constituted impermissible viewpoint discrimination); *Rosenberger*, 515 U.S., at 842-46 (holding that state university's refusal to fund student group's newspaper expressing Christian editorial viewpoint was viewpoint discrimination, and that funding newspaper as part of general, religion-neutral program funding various student groups did not violate Establishment Clause); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-96 (1993) (holding that exclusion of Christian-oriented film series from program allowing various groups to use school premises after school hours constituted viewpoint discrimination, and rejecting argument that allowing films would violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding that state university could not deny student prayer and Bible-study group access to university facilities available to other student groups).

Davey's Free Speech rights are implicated both by his declaration of intent to pursue the study of theology from a devotional perspective—which caused Washington to revoke his Promise Scholarship, *see* JA 97—and by his choice to pursue that academic course of study itself, *cf. Grutter v. Bollinger*, 123 S.Ct. 2325, 2336 (2003) ("[A]cademic freedom [has] 'long been viewed

as a special concern of the First Amendment.'") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring)); *see also id.*, at 2338 (same).

2. The Scholarship Law's Exclusion of Devotional Theology Students Constitutes Viewpoint Discrimination Under *Rosenberger*.

Rosenberger is particularly instructive because it, like the present case, involved a refusal to provide funding—a generally available benefit for which the applicant otherwise qualified—solely on the basis of religious belief. In *Rosenberger*, the defendant university subsidized the printing costs for a variety of student publications as part of a general program supporting extracurricular student activities paid for by a student fee assessment. 515 U.S., at 822-24. When WAP, a Christian student group, sought reimbursement for publishing its religious-themed newspaper, the university denied funding on the ground that the newspaper involved "religious activity" for which university rules prohibited funding. WAP sued, claiming violations of its rights to freedom of speech and press, free exercise, and equal protection. *Id.*, at 827. The court of appeals affirmed summary judgment for the university, holding that the university's actions constituted viewpoint discrimination but that such discrimination was justified by a compelling interest in maintaining strict separation of church and State. *Id.*, at 828.

This Court reversed, holding that the university's funding choice unjustifiably violated WAP's free speech rights. Because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," it engaged in viewpoint discrimination; nor was this cured by the university's refusal to fund all religious views, since that was simply discrimination "against an entire class of viewpoints." *Id.*, at 831. Noting that the university had created a forum "more in a

metaphysical than in a spatial or geographic sense," the Court stated that the university was entitled to reserve its self-created forum for certain groups or discussion topics but could not engage in viewpoint discrimination within those limits once it had created the limited public forum. *Id.*, at 829-30. And in so holding, the Court rejected the university's argument—similar to Washington's argument in this case based on its state constitution—that the asserted need to satisfy Establishment Clause requirements justified its discriminatory treatment. *Id.*, at 837-847.

The court of appeals relied heavily on *Rosenberger*. *See Davey*, 299 F.3d, at 756. And for good reason: *Rosenberger*, like the instant case, involved a generally applicable government program, administered in such a way as to discriminate specifically against those exercising their religious liberty. Neither program, administered in such a discriminatory manner, is constitutional.

3. The "Funding" Cases Are Inapposite.

Significantly, the Court in *Rosenberger* rejected the argument that the prohibition of viewpoint discrimination was inconsistent with the Court's funding decisions involving a governmental body's *own* speech. 515 U.S., at 832, 834 (discussing *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983)). *Rust* and *Regan* held that the government may use tax dollars to promote its own policies over competing policies without violating the First Amendment, even though the competing policies may involve constitutionally protected activities. *See Rust*, 500 U.S., at 194 (upholding federal prohibition on abortion-related advice applicable to recipients of federally-funded family-planning counseling); *Regan*, 461 U.S., at 548 (upholding federal law allowing veterans' groups with tax-favored status to engage in lobbying while denying tax-favored status to other lobbying groups). In contrast, by choosing to support a "broad range of extracurricular student activities" related

to its educational purpose, the University of Virginia was not "itself speak[ing] or subsidiz[ing] transmittal of a message it favors but instead expend[ing] funds to encourage a diversity of views from private speakers." 515 U.S., at 824, 834. *Rosenberger*'s holding that the university could "not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the [government's] own speech, which is controlled by different principles." *Id.*, at 834.

For much the same reason, Petitioners' reliance is misplaced on *Rust*, *Regan*, and other cases reiterating the principle that the government's refusal to sponsor the exercise of constitutional rights is not itself unconstitutional. *See* Pet'r Br. at 24 (discussing, *inter alia*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that statute requiring artwork meriting federal funding to demonstrate decency and respect for diverse values and beliefs was not invalid restriction of free speech rights); *Harris v. McRae*, 448 U.S. 297 (1980) (rejecting claim of right to federal funding for medical services incident to constitutional right to medically necessary abortions), and *Maher v. Roe*, 432 U.S. 464 (1977) (rejecting claim of right to federal funding for medical services incident to constitutional right to non-therapeutic abortions)).

The State of Washington's position in this case is not at all similar to that of the federal government in the above cases, which was "speaking on its own behalf" by using taxpayer funds to advance particular policy choices. By offering Promise Scholarships to all high-achieving students of lower- to middle-income families, Washington is not attempting to subsidize any message or to further any specific policy interest over a competing policy; it is simply rewarding academic achievement and encouraging meritorious high school students of modest means to pursue their college education in Washington State. Because Washington is providing a generally available benefit—like the student-activity funding provided in *Rosenberger*—in so doing it

may not engage in viewpoint discrimination by disqualifying eligible recipients based on religious belief.

Moreover, the cases on which Petitioners rely expressly condemn the type of discrimination fostered by the Promise Scholarship program. *See Finley*, 524 U.S., at 587 ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case."); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.").

4. Although Petitioners Are Not Required to Provide Promise Scholarships, They Could Not Offer Them to All Qualified Students Except Those Studying Devotional Theology.

Petitioners' argument that Davey has no constitutional right to have his education subsidized by the State, Pet'r Br. at 36-39—while correct as a general proposition—does not relieve Petitioners of their constitutional obligation to maintain religious neutrality. Although Washington was not required to fund Davey's study of religion *ab initio*, once the State created a generally available benefit—a scholarship offered to all qualified students—it could not withdraw Davey's scholarship based solely on his choice to focus on the study of theology from a religious perspective, just as the University of Virginia could not refuse WAP's student activity-fee funding based on its choice to publish a newspaper expressing a religious perspective. The court below correctly followed *Rosenberger* in holding that *Rust*, *Regan*, and similar "funding" cases are inapplicable to the present case because those cases involved the government's own speech—its use of funding to advance specific policy determinations—rather than the provision of a generally available benefit. *Davey*, 299 F.3d, at 756.

There is no doubt that, had Washington State chosen to engage in particular speech or subsidize particular conduct, it could have done so without running afoul of constitutional limitations. For example, if the Washington Legislature believed that there were too few engineers in Washington, it could easily have established a scholarship program to fund more engineers.[8] But there is no credible argument that that is what Washington State was attempting to do here. The Promise Scholarship does not focus funding on a few specific areas that the State seeks to promote; instead, it promotes higher education for all high achieving Washington students of limited means—and then specifically excludes those who choose to study theology from a religious perspective.

Once a generally applicable program is provided, it cannot be administered in such a discriminatory manner. For example, in the employment context, although an employer can discharge an "at-will" employee for any reason or no reason at all, an employer cannot terminate an employee on account of his or her race in contravention of federal law. *See, e.g., Perry v. Woodward*, 199 F.3d 1126, 1133 (CA10 1999), *cert. denied*, 529 U.S. 1110 (2000). Similarly, the broad latitude governments enjoy with respect to funding choices does not allow them to discriminate on the basis of religion. *See Finley*, 524 U.S., at 588 ("So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities."). While States are not constitutionally required to fund the advocacy of viewpoints espoused by any individual or group, they may not deny or take away a generally available benefit solely because the recipient

[8] Of course, even that limited program could be administered in an unconstitutional manner. For example, although the program could legitimately prohibit recipients from double majoring in other subjects, it could not allow double majoring in any subject *except* theology.

espouses a religious viewpoint. "The bottom line is that the government may limit the scope of a program that it will fund, but once it opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion." *Davey*, 299 F.3d, at 756.

The Free Speech Clause does not allow a State distributing a generally available benefit to engage in viewpoint discrimination based on the recipient's religious views or self-identification. *See Widmar*, 454 U.S., at 267-68 ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."). Washington's Promise Scholarship program violates that neutrality principle because it discriminates among scholarship recipients on the basis of their choice to study religion from a devotional perspective.

II. Washington's Scholarship Program Undermines the Constitutional Goal of a Pluralistic Society.

Underlying the principle of religious neutrality emanating from multiple constitutional sources is an ideal of a pluralistic society that not only tolerates but encourages the participation of a diverse variety of viewpoints and opinions. For example, this Court has observed that the Establishment Clause's guarantee of neutrality is respected "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S., at 839; *see also County of Allegheny v. ACLU*, 492 U.S. 573, 634 (1989) (O'Connor, J., concurring) ("[T]he relevant question for Establishment Clause purposes is whether [a] . . . display . . . sends a message of government endorsement of [religion] or whether it sends a message of pluralism and freedom to choose one's own beliefs."); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("In our modern,

complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."); *cf. Kiryas Joel Village Sch. Dist.*, 512 U.S., at 711 (concluding that State's creation of special school district for religious sect violated Establishment Clause and noting that law "affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors").

The courts of appeals have similarly recognized that the neutrality principle of the Establishment Clause serves to promote cultural diversity and religious freedom. *See Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (CA3 1980) ("An auspicious aspect of our pluralistic society is its rich religious diversity. The essential purpose of the Establishment Clause reflects this pluralism."); *O'Hair v. Andrus*, 613 F.2d 931, 934-35 (CA D.C. 1979) ("A central aspect of our pluralist society is its religious diversity. This pluralism reflects the very purpose of the Establishment Clause. And this pluralism is nurtured by the precept of equal access to a public facility generally open to the public.").

III. Washington's Scholarship-Funding Restrictions Promote Religious Discrimination, Not Religious Neutrality.

Religious liberty occupies privileged ground in our constitutional hierarchy. Our nation was founded by those fleeing religious persecution and seeking freedom of conscience and belief. Indeed, the very first words in the First Amendment protect religious liberty. Accordingly, governmental efforts to treat religious beliefs and conduct not with neutrality, but *worse* than

secular beliefs and conduct, should be met with the highest skepticism.

Petitioners rely on the Establishment Clause in Washington's State Constitution to excuse the discriminatory treatment sanctioned by the Promise Scholarship law. *See* Pet'r Br. at 4-5. Of course, a state constitution cannot authorize what the federal Constitution forbids, and the religious discrimination here cannot survive federal constitutional scrutiny.

Of equal importance, the particular state constitutional provision advanced by Petitioners is one borne of a "hostility to aid to pervasively sectarian schools [that] has a shameful pedigree that [the Court does] not hesitate to disavow." *Mitchell*, 530 U.S, at 828 (plurality op.). *See generally* Brief of the State of Alabama, as Amicus Curiae in Support of Respondent.

In the latter half of the nineteenth century, anti-Catholic sentiment gained in influence nationally. In an 1875 speech, President Grant described the Catholic Church as a source of "superstition, ambition and ignorance" and called for measures to "[e]ncourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school." President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (Sept. 29, 1875) (unpublished manuscript and typescript available in the Library of Congress) (quoted in Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 51 (1997) (hereinafter "Laycock")). Grant's speech similarly praised "good common school education" that, he said, should be "unmixed with sectarian, pagan or atheistical dogmas." *Id.* (quoted in Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 558 (2003) (hereinafter "DeForrest")).

The "good common school education" acclaimed by Grant was not a religiously neutral education. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 45 (1992) ("In all levels of education, both public and private, primary through collegiate, the moral teachings of the Bible were taught, and, to varying degrees, religious services were conducted.").

Indeed, Grant's fear that "sectarian"[9] doctrines would overtake the common school appeared to stem from the combination of an increasingly Catholic population and a decreasing tolerance for Protestant instruction in the public schools. DeForrest, *supra*, at 558. Between 1776 and 1866 the population of Catholics in America rose from one percent to ten percent of the total population—a ten-fold relative increase. *Id.*, at 561. By the mid- to late-1800s, "there was a move to de-Protestantize the common schools by removing the King James Bible from the curriculum and ending Protestant devotional activity in the classrooms." *Id.*, at 560. In Maine, a Catholic public-school student was expelled for refusing to read from the King James Bible; the Maine Supreme Court upheld the suspension, holding that the King James version of the Bible could not be considered "sectarian." *Id.*, at 561-62 (citing *Donahoe v. Richards*, 38 Me. 379, 379 (1854)). In some areas, Catholic groups sought and obtained state aid for parochial education. *Id.* At that time, "[a]nti-Catholic sermons were commonplace in Protestant churches, and anti-Catholic organizations began to sprout up, dedicated to continuing the Protestant character of common schools and united in their opposition to government aid for parochial education." *Id.*, at 563.

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[9] As this Court has noted, the latter half of the nineteenth century was "a time of pervasive hostility to the Catholic Church and to Catholics in general" and "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S., at 828 (plurality op.).

Against this backdrop of religious disagreements in the public schools, Congressional Representative James Blaine answered Grant's call to keep "good common school education" "unmixed with sectarian, pagan or atheistical dogmas." *Id.*, at 558. Blaine proposed an amendment to the U.S. Constitution prohibiting state money from being used for religious instruction:

> No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, or District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught.

H. Res. 1, 44th Cong. (1876). This amendment passed the House of Representatives but narrowly failed in the Senate. Had the Blaine Amendment passed and been adopted, it would not have ended the practice of religion in public schools; instead, it would have "permit[ed] Bible reading in the public schools but forbidd[en] any use of state or federal funds to support religious school." Laycock, *supra*, at 51.

While the Blaine Amendment failed to gain enough votes to gain entry to the U.S. Constitution, it did add its influence to many state constitutions. In fact, the Blaine Amendment gained enough support nationally that Congress passed legislation requiring new States entering the union to adopt similar language in their state constitutions. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 220 (1948) (Frankfurter, J., concurring) ("[E]very State admitted to the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system 'free from sectarian control.'"); *see, e.g.*, Act of Feb. 22, 1889, ch. 180, 25 Stat. 676

(1889) (enabling the admittance of North Dakota, Montana, South Dakota, and Washington into the United States, and requiring the states to maintain "public schools . . . free from sectarian control").

Washington was thus required to add such language to its constitution as a condition of statehood, and did indeed add Blaine-like language in WASH. CONST. art. I, §11 ("No public money or property shall be appropriated for, or applied to any religious worship, exercise, or instruction, or the support of any religious establishment") and WASH. CONST. art. IX, §4 ("All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."). *See also* Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 478 (1988) (hereinafter "Utter & Larson").

There is little evidence of the Washington Framers' intentions regarding these provisions; nevertheless, the scant evidence available suggests that, at a minimum, the Washington Framers were no more endeavoring to promote religious neutrality than Representative James Blaine had been. The Washington Framers considered a proposal to include in article IX, §4 a provision prohibiting religious exercises or instruction, but they rejected that proposal. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 329, 689 (B. Rosenow ed. 1962); *see also* Utter & Larson, *supra* at 478. Similarly, Washington Senator William W. Blair made clear his view that article IX, § 4 would not prohibit public schools from educating pupils in "virtue, morality, and the principles of the Christian religion." Utter & Larson, *supra*, at 461-67.

The history of article I, §11 and article IX, §4 shows that these provisions are tarnished with bigotry and religious discrimination. Unfortunately, Washington is not alone in sharing in this ugly

chapter of American history. The religious bigotry that characterized the introduction of the Blaine Amendment bore fruit in the many States that are today burdened with their own Blaine Amendments.[10]

Given this history, the Court should continue to "disavow" the "shameful pedigree" of Blaine Amendments, *Mitchell*, 530 U.S, at 828 (plurality op.). The Court need not rule that Blaine Amendments in general—or article I, §11 and article IX, §4 of the Washington Constitution in particular—are themselves unconstitutional; rather, the Court should hold simply that they must be read in accordance with the dictates of the federal Constitution. And the Court should make clear that these remnants of another time cannot justify a State's departure from the Court's bedrock principle of neutrality with respect to religion.

As this Court has stated, the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are

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[10] Indeed, *amicus* the State of Texas has its own Blaine Amendment, TEX. CONST. art. I, §7, which the Texas Supreme Court has simply left on the books and wisely not given independent life beyond the federal Religion Clauses. In the shadow of these many Blaine Amendments, *amici* the State of Vermont *et al.* can readily point to other state programs with exclusions similar to Washington's. *See* Br. of *Amici* the State of Vermont *et al.* in Support of Petitioner, at 18 n.5. Yet the presence of such additional programs—perhaps even within the signatories to the instant *amicus* brief—underscores, rather than undermines, the importance of the Court's clarifying that Blaine Amendments and programs promulgated in their spirit cannot contravene the principle of neutrality and cannot discriminate on the basis of religion. Such a holding will protect the religious liberty and constitutional rights of the citizens of all *amici* States.

broad and diverse." *Rosenberger*, 515 U.S., at 839. Requiring Washington's Promise Scholarship to no longer exclude devotional theology students will promote that diversity, respect the constitutional norm of neutrality, and prevent unconstitutional discrimination on the basis of religion.

CONCLUSION

For these reasons, the judgment of the Ninth Circuit should be affirmed.

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